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Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1989

In the Matter of the Claim for COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

THE LOUISIANA INSURANCE GUARANTY ASSOCIATION
Petitioners,

versus

NEIL ABBOTT, JR.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Does the Longshore and Harbor Workers' Compensation Act, as interpreted by the Fifth Circuit, provide an adequate remedy to a defendant who has been denied due process by an Administrative Law Judge where the Administrative Law Judge failed to continue the formal hearing despite recognizing that the defendant did not receive notice of the hearing, failed to allow that defendant to present any evidence to controvert the claim for benefits, and imposed liability on that defendant after indicating that that defendant's liability would not be an issue considered at the formal hearing.

II. Can the denial of due process by an Administrtive Law Judge be raised as an affirmative defense in an enforcement proceeding brought pursuant to 33 U.S.C. §918(a) to show that the compensation order was not "issued in accordance with law"?

III. Did the District Court err in entering judgment in accordance with a compensation order when the District Court recognizes that the defendant "was totally denied due process" at the administrative hearing upon which that compensation order was based?

LIST OF PARTIES

All of the parites in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

The LIGA is an non-profit, unincorporated statutory entity, domiciled in the Parish of East Baton Rouge, State of Louisiana, and created by the Louisiana legislature pursuant to the provisions of LSA R.S. 22:1375 *et seq.* The LIGA was formed to provide a mechanism for the payment of covered claims under certain insurance policies and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and protection of insurance insolvency, and to provide an association to assess the cost of such protection among inusrers.

The purpose of the LIGA is generally to pay legitimate cliams where and then becomes insolvent. The LIGA does not cover every policy of insurance issued within the state.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Louisiana Insurance Guaranty Association petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit denying relief to a defendant ordered to pay compensation benefits by an Administrative Law Judge where at the time of the formal hearing that Administrative Law Judge advised the defendant that it did not receive adequate notice of the hearing and that that defendant's liability would not be an issue at that hearing.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-8a) is reported at 889 F.2d 626. The opinion of the district court is not reported but the reasons for judgment

are contained in App. B (infra, 9a--22a). The notices of hearing and decision and order of the Administrative Law Judge, as well as the Deputy Commissioner's supplemental order of compensation (App. C, infra, ____) are not reported. A transcript of the hearing before the Administrative Law Judge (App. D, infra, ____) has also been provided.

JURISDICTION

The judgment of the court of appeals (App. A, infra, ____) was entered on December 6, 1989. A petition for rehearing was denied on January 3, 1990 (App. A, infra, ____). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

APPLICABLE STATUTES

See Appendix E.

STATEMENT OF THE CASE

Despite the fact the District Court concluded the Administrative Law Judge before whom the formal hearing for compensation was held "totally denied" the LIGA due process where that ALJ held the hearing despite concluding the LIGA did not receive notice of the hearing, advised LIGA they could subsequently introduce evidence into the record but decided the claim without receiving that evidence, and imposed liability on the LIGA despite advising them at the formal hearing their liability would not be an issue considered at that hearing, the Fifth Circuit concluded the LIGA was not denied due process and could not be afforded relief from payment of compensation benefits.

Plaintiff/Claimant, Neil Abbott, filed a claim for com-

pensation benefits pursuant to the provisions of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §901 *et seq.*, for injuries allegedly sustained to his back on January 11, 1983 while employed as a welder by Universal Iron Works, Inc. The claim was referred to the Office of Administrative Law Judges on September 30, 1986 for a formal hearing in accordance with Act and associated regulations and a Notice of Hearing and Pre-Trial Order was entered by the Administrative Law Judge (hereinafter "ALJ") on January 13, 1987 setting the formal hearing for April 27, 1987.

Due to the bankruptcy of Universal Iron Works, Inc. and of its carrier, Western Preferred Casualty Company, the Claimant moved to add the Louisiana Insurance Guaranty Association (hereinafter "LIGA") as a respondant. Western Preferred Casualty Company, a non-admitted surplus lines carrier not admitted to do business in Louisiana provided Universal Iron Works with worker's compensation insurance. Early American Insurance Company, an admitted carrier, by means of a "cut-through" endorsement agreed, in the event Western Preferred failed to pay any loss, to become liable for the loss after receiving written notice and demand for payment from the insured.

The hearing originally set for April 27, 1987 was continued due to the fact counsel for the employer "had just received notice of hearing and needed additional time for proper preparation." By Order dated July 13, 1987 of the Administrative Law Judge, on Motion by the Claimant, added the Louisiana Insurance Guaranty Association as an additional Respondant tot he proceedings due to the insolvency of Western Preferred Casualty Company, the worker's compensation carrier for Universal Iron Works, the Claimant's employer.

On or about September 1, 1987, Judith Atkinson, of Mathews, Atkinson, Gugliemo, Marks & Day, general counsel for the LIGA, received a telephone call from the counsel for the Claimant advising that the formal hearing had been set for September 10, 1987. The LIGA retained trial counsel who immediately moved to continue the hearing based upon a conflicting trial schedule, insufficient notice and inadequate time within which to engage in discovery and properly prepare the claim for presentation at the formal hearing. A written motion to continue the hearing was filed with an attached Affidavit from general counsel for the LIGA indicating that they had never received notice of the hearing. The ALJ issued an "Order postponing ruling on Motion for Continuance" ordering that "the parties should report to the Hearing as scheduled, that each party will be given the opportunity to present its position, and that a ruling on the Motion for Continuance is deferred until that time.

The parties appeared before the Administrative Law Judge on September 10, 1987. At that time the ALJ denied the LIGA's Motion to Continue and advised the parties that he was "going to allow this gentleman to establish his rights to benefits, if he has any." However, the ALJ advised the parties as follows:

> "This employer, according to the best information available is defunct by a matter of law. That does not keep (the Claimant) from having the right to let the world know that he was working on a job within the jurisdiction of this Court, and has sustained some injury, and has some rights to benefits by that fault. (Appendix E, p. 13 of Transcript).

The ALJ then stated:

> "I'm going to let the record show, then, that I do not claim, and I will not proceed on the basis that the Louisiana Insurance Guaranty Association has been served with process of sufficient time to require them to participate in this hearing, but that I do assume that with their appearance to present their position, and this statement made, that they have no present knowledge of their right to challenge this gentleman's proceedings to establish benefits against his employer, that they are in court for future, if any, scheduled settings of this case." (Appendix E, p. 15 of Transcript).

After the Claimant had presented evidence in support of his claim the Administrative Law Judge then stated:

> "Let the record reflect that I consider LIGA is a party, was not here in sufficient time to require them to participate, but to make available to them the opportunity to audit this proceeding, at which I would resist personally if I were involved, and the court's decision is challenged. I expect to address it briefly in the order." (Appendix E, p. 60 of Transcript).

Despite assurances from the Administrative Law Judge, on July 14, 1988 the Administrative Law Judge issued a Decision and Order holding that the Louisiana Insurance Guaranty Association was liable for compensation payments to the Claimant. The Louisiana Insurance Guaranty Association appealed the Decision and Order of the Administrative Law Judge to the Benefits Review Board and moved for a stay of compensation benefits from the BRB on the basis that because the LIGA was advised by the ALJ that is liability would not be considered and the LIGA was not afforded the opportunity to prepare for the

hearing and present evidence that LIGA was not afforded due process of law. By Order dated July 29, 1988 the Board denied the LIGA's Motion for Stay on the basis that irreparable harm had not been shown.

On September 6, 1988 Donnette Glenn, Deputy Commissioner of the Seventh Compensation District issued a Declaration of Default against the LIGA for failure to pay compensation in accordance with the Decision and Order of the Administrative Law Judge. On or about September 16, 1988 the Claimant filed in the United States District Court for the Eastern District of Louisiana a Petition for Enforcement of the Order pursuant to Section 21(d) of the Act, 33 U.S.C. §921(d). Despite recognizing that the LIGA was "totally denied due process" by the Administsrative Law Judge, Judge Henry A. Mentz entered Judgment in favor of Neil Abbott on December 6, 1988. The Louisiana Insurance Guaranty Association perfected a timely appeal to the United States Court of Appeals for the Fifth Circuit. On December 6, 1989 the Fifth Circuit issued its Decision affirming the trial court's judgment in favor of the Claimant. The timely petition for rehearing was filed by the Louisiana Insurance Guaranty Association; the Fifth Circuit denied rehearing on January 3, 1990. the Louisiana Insurance Guaranty Association now petitions the United States Supreme Court for Writs of Certiorari to review the decisions below.

REASONS FOR GRANTING THE WRIT

Review should be granted to determine whether the Longshore and Harbor Workers' Compensation Act provides adequate constitutional safeguards to a defendant who has been found liable for compensation payments where that defendant did not receive notice of the formal hearing before the Administrative Law Judge, was not

given an opportunity to present evidence to the Administrative Law Judge, and was advised by the Administrative Law Judge that its liability would not be considered. Despite the fact the district court held that the defendant "was totally denied due process' by the Administrative Law Judge, the district court held that the provisions of the Longshore and Harbor Workers' Compensation Act prohibited that court from correcting a recognized due process violation. In effect, the court held the provisions of the LHWCA superseded the constitutional mandate of due process of law. Affirming, the Fifth Circuit held that the district court was precluded from addressing the constitutional deprivation and further held that even though the LIGA would be unable to recoup payments erroneously made, that the LIGA had suffered neither irreparable injury nor a violation of due process of law since the review provided by the LHWCA was not "inadequate to make the aggrieved party whole."

Because, in effect, the courts below decided that the LIGA, who did not receive notice of the hearing, was not given the opportunity to present evidence, and was advised by the ALJ that its liability would not be contested, and who must now make compensation payments which it has no hope of recouping has neither been denied due process nor suffered irreparable harm.

The record is clear that the LIGA did not receive notice of the formal hearing before the Administrative Law Judge in accordance with the provisions of the Longshore and Harbor Workers' Compensation Act, that the Administrative Law Judge agreed that the Notice was not adequate. Regardless the Administrative Law Judge conducted the hearing and held the LIGA bound by the findings of that hearing. Although the ALJ advised counsel for the LIGA that they would be afforded the opportunity

to present evidence and their liability would not be at issue, the Administrative Law Judge issued a decision and order holding LIGA liable for compensation benefits without either affording the LIGA the opportunity to present evidence or advising LIGA that they would be held liable.

The Second Circuit has held that the failure of an administrative body to follow its own rules and regulations tends to cause unjust discrimination and deny adequate notice contrary to the fundamental concepts of fair play and due process. *International House v. NLRB*, 676 F.2d 906 (2nd Cir. 1982). Despite recognizing the fact that the LIGA did not receive notice of hearing in accordance with the provisions of the LHWCA, the Administrative Law Judge failed to grant the LIGA a continuance and conducted the hearing without giving the LIGA any meaninful opportunity to present controverting evidence or otherwise effectively participate.

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 LED 2d 18 (1976). This requirement generally means that a party must have the opportunity for a hearing before the government initially interferes with the party's protected property interest. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493, 84 LED 2d 494 (1985). Even if the procedures employed by the Administrative Law Judge were improper, this Court has allowed such practices only if "some kind of hearing" insuring an effctive "initial check against mistaken decisions" is proveded before the deprivation occurs, and a *prompt opportunity for complete administrative and judicial review is available. Cleveland Board of Education v. Loudermill, supra.* (Emphasis added).

While the Fifth Circuit held that Congress provided challenges to the procedural or substantive correctness of compensation orders are to be tested preliminarily by appeal to the BRB and by the Motion for a Stay, 33 U.S.C. §921(b)(3), and that the opportunity to petition for a stay provides a prompt, pre-enforcement check against mistaken ALJ decisions, this conclusion is completely contrary to prior Fifth Circuit opinions.

In *Rivere v. Offshore Painting Contractors,* 872 F.2d 1187 (5th cir. 1989), the Fifth Circuit held that the Benefit Review Board's ability to grant a stay pursuant to Section 21(b)(3) of the Act, 33 U.S.C. §921(b)(3) were 'severely restricted" and only allowed for a stay where "irreparable injury would otherwise ensue to the employer and carrier." *Id* at 1191. Irreparable injury was defined as occurring *only* when:

> "The compensation award may be too heavy for the employer (or insurer) to pay without practically taking all his property or rendering him incapable of carrying on his business or . . . by reason of age, sickness, or other circumstances (of the payer), a condition is created which would amount to irreparable injury." *Id.* at 1191.

In *Philips v. Marine Concrete Structures, Inc.,* 877 F. 2d 1231 (5th Cir. 1989) the Court again held that the Act "places strict limits on the BRB's power to stay the collection of an award pending a review."

Based on the above, Fifth Circuit decisions hold that the stay of the payment of compensation benefits is restricted to those situations where the payment of these benefits would cause the payer to become bankrupt. The Fifth Circuit's prior decisions hold that concepts of due process are not to be considered when the payer applies to

the Benefits Review Board for a stay. Quite the contrary, these prior Fifth Circuit decisions hold that only economic factors are to be considered by the Benefits Review Board in granting a stay; *only* the payer's ability to pay is to be considered, not the procedure employed in determining the liability of the payer. Also, the burden for establishing irreparable injury entitling the payer to a stay of compensation benefits is more onerous than the demonstration of a violation of a due process of law. Therefore, the Fifth Circuit's holding below was an error since its prior decisions clearly show that the motion for a stay does not protect against due process violations but only protects against the more onerous consideration of financial hardship.

The present case is a perfect example. The LIGA has not alleged it will go bankrupt by paying compensation, but that it has been denied due process in being found liable for compensation payments. Because the LIGA has not alleged bankruptcy it could not prove irreparable harm and obtain a stay of payments from the Benefits Review Board. However, the LIGA is liable for compensation benefits without receiving notice of the hearing nor being able to meaningfully participate in the hearing, and after being advised by the Administrative Law Judge that its liability would not be considered. Therefore, the LIGA's ability to petition the Benefits Review Board for a stay of compensation benefits does not address the due process violation which the LIGA has suffered.

Pursuant to the provisions of Rule 10.1(c) of the Rules of the Supreme Court this Writ of Certiorari should be granted because of the Fifth Circuit Court of Appeals "has decided a federal question is a way that conflicts with applicable decisions of this court." Purporting to fulfill the requirements announced by this Court in *Matthews v. Eldridge, supra*, and *Cleveland Board of Education v.*

Loudermill, supra, the Fifth Circuit Court of Appeals has indicated that an injunction proceeding (§921(b)(3)'s motion for stay of compensation benefits to the Benefits Review Board) which is based up a more oneour "economic hardship" standard fulfills the requirements of procedural due process.

Additionally, the process of appealing the decision and order of the Administrative Law Judge to the Benefits Review Board does not meet the due process requirements announced by this court in *Clevland Board of Education v. Loudermill* in that that review is not prompt. the LIGA has experienced a 36 month "turnover" between the time an appeal is filed with the Benefits Review Board and the Benefits Review Board renders its opinion on that appeal. Although the Fifth Circuit indicated the LIGA did not adequately explain why the delay was unreasonable, the Fifth Circuit recognized that the LIGA would have to pay compensation during the pendency of that appeal "that LIGA may be unable to recoup payments *erroneously* made," and that "obtaining reimbursement from the LHWCA fund is uncertain." (*Emphasis added*).

As an additional basis of review the LIGA claims that it should be permitted to allege due process violations to the District Court Judge in an enforcement proceeding brought pursuant to Section 18(a) of the Act [33 U.S.C. §918(a)] in that the preenforcement review provided by the appeal and the Motion to Stay payment of compensation benefits to the BRB was insufficient.

In determining whether the LIGA had a constitutional right to pre-enforcement review of the compensation order the Fifth Circuit weighed the competing interest of the LIGA (inability to recoup payments erroneously made and questionable reimbursement from the LHWCA special

fund) against the interests of the government (in maintaining a quick and inexpensive mechanism for getting compensation into the hands of injured workers). Because the Fifth Circuit concluded that "it is undisputed that Abbott is entitled to benefits" the Court held that District Court review of the compensation order would only cause additional unwarranted delay and expense.

The Fifth Circuit's Decision did not address the finding of the District Court in that the LIGA was denied due process by the Administrative Law Judge nor was the fact that the LIGA was not afforded the opportunity to present any evidence controverting the Claimant's entitlement to benefits to the ALJ weighed by the court in determining whether the district court could consider the proceedings before the ALJ.

The LIGA wishes to point out that with the presumptions provided by §20(a) of the Act [33 U.S.C. §920(a)] and the fact that the Claimant's counsel presented a prima facie case to the ALJ, there could be no other conclusion after examining the record but that the Claimant was entitled to benefits. The Fifth Circuit did not properly consider the LIGA's inability to present evidence to the Administrative Law Judge. Although the Claimant sustained an injury on January 11, 1983 and evidence was presented to the Administrative Law Judge indicating that the Claimant was permanently totally disabled at the time of the hearing, the LIGA was not afforded the opportunity to present medical evidence to the Administrative Law Judge showing that the Claimant reached maximum medical improvement on April 18, 1984 with a resulting 5% whole body disability but was later involved in a November 14, 1984 motor vehicle accident which either aggravated or exacerbated any previous injuries the claimant may have sustained as a result of his work related accident. Addi-

tionally, the Fifth Circuit decision does not consider the LIGA's inability to present vocational evidence indicating the claimant reached maximum medical improvement and had a subsequent injury to the Administrative Law Judge demonstrationg the Claimant's resulting employability.

While the Fifth Circuit concluded that the appeal and Motion to Stay to the Benefits Review Board adequately protected the LIGA's due process of rights, it should be pointed out that the Benefits Review Board refuses to accept evidence not presented to the Administrative Law Judge and that the LIGA was not in the possession of this evidence at the time of the hearing before the Administrative Law Judge.

Considering these factors the LIGA should be afforded the opportunity to present as an affirmative defense in the Section 18(a) enforcement proceeding violations of due process in the hearing before the Administrative Law Judge.

Lastly, the LIGA takes the position that the District Court judge was in error in entering judgment in favor of the Claimant despite the fact he recognized the LIGA was not afforded due process before the Administrative Law Judge.

In *Winterberger v. General Teamsters Auto, Truck Drivers and Helpers Local Union 162,* 558 F.2d 923 (9th Cir. 1977), the Ninth Circuit citing *Eagles v. Samuels,* 329 U.S. 304, 314, 67 S. Ct. 313, 91 LED 308 (1946) held that an administrative proceeding effected with fundamental procedural error, like a void judicial judgment, is a legal nullity and subject to collateral attack. In such instances the Ninth Circuit held that the trial court has jurisdiction

and discretion to review the administrative procedures below. Therefore, the Louisiana Insurance Guaranty Association takes the position that the District Court Judge erred both in enforcing a constitutionally defective administrative compensation order, and failing to determine, as required by§918(a), that the compensation order was issued "in accordance with law."

Since the Fifth Circuit held the District Court Judge lacked the authority to review the underlying administrative proceedings, the decision of the Fifth Circuit conflicts with that of the Ninth Circuit. Therefore, this Court should grant Petitioner's Writs of Certiorari.

CONCLUSION

The present case clearly illustrates the Fifth Circuit's unconstitutional interpretations and applications of the provisions of the Longshore and Harbor Workers' Compensation Act as they relate to the protection of an aggrieved defendant's due process rights. The need for review is further intensified when one realizes the Fifth Circuit contains a disproportionately high number of employees who come within the jurisdiction of the Longshore Act. Not only would employers in the Ports of Houston and New Orleans be effected, but shipyards such as Ingalls and Avondale, as well as firms involved in the oil industry in the Gulf of Mexico whose employees fall under the Outer Continental Shelf Lands Act.

For the reasons set forth above, it is respectfully submitted that the Petition for Certiorari in this matter be granted to review the judgment and opinion of the United

States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BY: _____

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this ____ day of February, 1990, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

_____

COLLINS C. ROSSI